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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DIMIKA L. HILL,

Defendant and Appellant.

B211236

(Los Angeles County  
Super. Ct. No. TA091886)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary E. Daigh, Judge. Affirmed in part and reversed in part.

Alan Stern, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Beverly K. Falk, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Dimika Hill was convicted by a jury of voluntary manslaughter (count one) and child abuse (counts three and four), violations of Penal Code sections 192, subdivision (a), and 273a, subdivision (a), respectively. As to counts three and four, Hill was alleged to have personally inflicted great bodily injury on the victim within the meaning of Penal Code section 12022.7, subdivision (d), but the jury found the allegations not true. Hill was sentenced to serve a prison term of 11 years on count one plus a consecutive one year four months on count four. On count three she was sentenced to a concurrent term of four years.

On appeal, Hill contends insufficient evidence supports her conviction on count three. We agree and reverse her conviction as to that count.

## **BACKGROUND**

In July 2006, Timothy, one and a half years old, and Alex, an infant, came to live with Hill, who was their mother's sister, and her four children. The day he arrived at Hill's home, Timothy was clean, quiet, and well dressed, with no marks or bruises. At a medical appointment 11 days later Timothy was withdrawn and passive and he and his clothes were dirty. Four days later, a social worker noticed bruises on Timothy's forehead. Hill explained he would have tantrums and would hit his head on the floor and wall. Hill's children testified Timothy threw tantrums for food, was always asking for food and would sometimes not be given any because it cost too much. On approximately September 13, 2006 Timothy had a black eye. Hill explained that he fought with the other children and she was becoming stressed by his tantrums and the fighting.

On Sunday, October 9, Timothy suffered a broken arm. Hill said that while playing—he liked to watch Spiderman on television and imitate the actions he saw—he hit his arm on the wall. She said that when she noticed his arm starting to swell she took him to an emergency room. Hill's daughter told the social worker the injury occurred on a Sunday and Hill took Timothy to the hospital the next Tuesday. In November, Hill told an investigating social worker no one saw the injury occur. She said Timothy liked to

watch Funniest Home Videos on television and would imitate things he saw, and she suspected he was imitating the show by riding his toy truck down the stairs when he was injured. Neither the emergency room physician, Timothy's orthopedist nor the deputy medical examiner offered an opinion as to the cause of the fracture.

Hill's five-year-old daughter told a social worker Hill would hit Timothy on the head with a hand, belt or shoe when he would eat food off the floor. She would hit all the children with belts and brushes and had at least once thrown Alex onto the bed.

Timothy died on October 25, 2006. The autopsy revealed he had suffered, in addition to the broken arm, a fresh scratch, salt-and-pepper bleeding (petechiae) around the eye, several bruises, fresh burns, a fractured skull, hemorrhaging on the stomach, bruising on the liver, pancreas, kidney and adrenal gland, a tear in the right atrium of his heart, and a partially collapsed and hemorrhagic lung. He had a crescent shaped mark on the chest probably caused by the heel of a shoe. The skull fracture occurred minutes to a few hours before death and was not fatal. The ruptured heart was fatal.

Alex was examined on October 27, 2006. He had several injuries that were consistent with nonaccidental trauma or child abuse.

On appeal, Hill contends insufficient evidence supports her conviction on count three. Count three relates only to Timothy's broken arm.

## **DISCUSSION**

"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Green* (1980) 27 Cal.3d 1, 55.)

Penal Code section 273a, subdivision (a) (hereafter section 273a), can be violated in several ways. The statute provides: "Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any

child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.”

A violation of section 273a “can occur in a wide variety of situations: the definition broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangering by extreme neglect. Two threshold considerations, however, govern all types of conduct prohibited by this law: first, the conduct must be willful; second, it must be committed ‘under circumstances or conditions likely to produce great bodily harm or death.’ [Citation.] Absent either of these elements, there can be no violation of the statute.” (*People v. Smith* (1984) 35 Cal.3d 798, 806.)

“‘[L]ikely’ as used in section 273a means a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death.” (*People v. Wilson* (2006) 138 Cal.App.4th 1197, 1204.)

“When the harm to a child is directly inflicted, the requisite mental state for the section 273a offense is general criminal intent. [Citations.] When that harm is indirectly inflicted, the requisite mental state is criminal negligence.” (*People v. Burton* (2006) 143 Cal.App.4th 447, 454.) “Criminal negligence is aggravated, culpable, gross or reckless conduct that is such a departure from that of the ordinarily prudent or careful person under the same circumstances as to be incompatible with a proper regard for human life. [Citation.] A defendant may be deemed to be criminally negligent if a reasonable person in his or her position would have been aware of the risk. [Citation.]” (*Ibid.*)

“[T]here is no requirement that the actual result be great bodily injury. The statute is intended to protect a child from an abusive situation in which the probability of serious injury is great.” (*People v. Jaramillo* (1979) 98 Cal.App.3d 830, 835.)

No evidence suggests Hill broke Timothy’s arm or willfully caused or permitted it to be broken or willfully caused or permitted him to be placed in a situation where he would suffer the injury.

The People argue Hill's varying explanations evidence consciousness of guilt. We do not agree. The explanations—that the injury occurred while Timothy was either pretending to be Spiderman or riding his truck down the stairs—were speculative. Discrepancy inevitably follows speculation, and does not necessarily or even probably indicate guilt.

The People argue Hill's allowing Timothy to play unsupervised near stairs with a toy that could be ridden constituted criminal negligence. This is arguably true only if she reasonably should have known he was riding the toy down the stairs. No evidence suggests she did. Not every parent who resides in a house that has stairs, young children and rideable toys is criminally negligent.

The People argue Hill fabricated her ignorance about the injury, as she would immediately have found him crying had he broken his arm while imitating what he had seen on television. No evidence supports the People's speculation.

The facts do not support Hill's conviction on count three.

### **DISPOSITION**

The judgment is reversed as to count three and affirmed otherwise.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.